

The Honorable Robert S Lasnik

JAMES MCDONALD
14840 119th PL NE
Kirkland, WA 98034
Phone (425) 210-0614
In Pro Per

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In Re:

NO.: C10-1952RSL

JAMES MCDONALD

Plaintiff

v

ONEWEST BANK, FSB, *et al.*,
Defendants.

Plaintiff's Response to Defense's
Answer to Initial Complaint

TO: CLERK OF THE U.S. DISTRICT COURT
HEIDI E. BUCK, Attorney for Defendants

COMES NOW Plaintiff, James McDonald and submits this Response to the Answer by the Defendants collectively to the Plaintiff's Initial Complaint.

I. Jurisdiction, Venue and Parties

1.1 Defendants admit Paragraph 1.1 is true therefore no answer is needed.

1.2 It appears to Plaintiff that this Answer by the Defendants is merely a form letter or there would have been a different response here.

1.3 Defendants admit in part the allegations in Paragraph 1.3.

1.3.1 Defendant OneWest admits that it does business in King County, Washington with headquarters located in Pasadena, CA.

1.3.2 Defendant OneWest denied being the successor in interest to MERS in the Defendants Answer to the Initial Complaint even though they claim to have been assigned beneficial

Plaintiff Response to Defense Answer to Initial
Complaint

-1-

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1 interest in the Assignment of Deed of Trust. It is perplexing to deny this in one spot and claim it as their
2 basis for the right to foreclose.

3 1.3.2.A MERS assigned its beneficiary status in the Deed of Trust to OneWest.

4 ☐ Admit ☐ Deny

5 1.3.2.B At the time that MERS assigned its beneficiary status in the Deed of Trust
6 to OneWest it was not the owner of the promissory note.

7 ☐ Admit ☐ Deny

8 1.3.2.C MERS has never purchased the Note in question.

9 ☐ Admit ☐ Deny

10 1.3.3 The initial complaint states, "OneWest Bank's subsidiary IndyMac Mortgage Services
11 is currently servicing the loan number 125049243." However in the Answer to the Initial Complaint
12 OneWest denies everything but that they do business in Washington. It appears they now deny that
13 Indymac Mortgage Services is their subsidiary and that they are servicing the loan. That is in direct conflict
14 with other claims they have made both during the process of the lawsuit and in every action since they
15 became involved in the loan in question.

16 1.3.3.A Indymac Mortgage Services is currently a subsidiary of OneWest Bank.

17 ☐ Admit ☐ Deny

18 1.3.3.B OneWest claims to service the loan through its subsidiary Indymac
19 Mortgage Services.

20 ☐ Admit ☐ Deny

21 1.4 Defendants admit in part the allegations stated in Paragraph 1.4 of the Complaint.

22 1.4.1 Defendant Northwest Trustee Services admits to being a Washington based
23 corporation.

24 1.4.2 Defendant Northwest Trustee Services admits to recording a Notice of Trustee Sale
25 for the property in question.

26 1.4.3 Defendant Northwest Trustee Services states they lack sufficient information to admit
27 or deny Paragraph 1.3 of the Initial Complaint and thus denies them. However nothing in Paragraph 1.3
28

1 pertains to Defendant Northwest Trustee Services. It may be that they simply meant a different section
2 which shows the lack of serious care in the preparation and execution of this Answer.

3 1.4.4 Northwest Trustee Services scheduled a non-judicial foreclosure sale set for Friday,
4 December 10th, 2010 at 10:00am.

5 ☐ Admit ☐ Deny

6 1.4.5 The trustee sale above was to be held at a privately owned office complex located at
7 3535 Factoria Blvd, Bellevue, WA.

8 ☐ Admit ☐ Deny

9 1.5 Defendant MERS admitted to being a corporation in Delaware and listed as the beneficiary in
10 the Deed of Trust in Paragraph 1.5 but yet states that they can not admit or deny the rest of the Paragraph.
11 There is nothing more in that paragraph save that their mailing address is 1818 Library St, Reston, Virginia.
12 It seems odd that they would not have sufficient information to admit or deny this. However Plaintiff does
13 want to be assist the Defense so will make the statement simpler:

14 1.5.1 MERS has a mailing address located at 1818 Library St, Reston, Virginia?

15 ☐ Admit ☐ Deny

17 **II Background Facts and History**

18 2.1 Paragraph 2.1 of the Complaint and Answer

19 2.1.1 Defendants Agree to the information contained in the Note and Deed of Trust.

20 2.2 Paragraph 2.2 of the Initial Complaint and Answer to Initial Complaint

21 2.2.1 Brian Burnett has never been an employee of MERS.

22 ☐ Admit ☐ Deny

23 2.2.2 Defendant OneWest claims there is a document (which they have failed to provide)
24 stating that Brian Burnett has signing authority on behalf of MERS and giving him the title of Assistant Vice
25 President.

26 ☐ Admit ☐ Deny

27
28 2.2.14 ***Should I mention the last line?***

2.3 Paragraph 2.3 of the Initial Complaint and Defendants' Answer to Complaint

2.3.1 Was the Appointment of Successor Trustee in question recorded in King County Recording number 20100204000503 on February 4, 2010?

☐ Admit ☐ Deny

2.3.2 Does Defendant concur with Plaintiff that the 1st Paragraph of the Appointment of Successor Trustee list Defendant MERS as beneficiary?

☐ Admit ☐ Deny

2.3.3 The third paragraph of the Appointment of Successor Trustee states that OneWest Bank FSB is the owner of the promissory note as of the date it was signed.

☐ Admit ☐ Deny

2.3.4 The third paragraph of the Appointment of Successor Trustee states that OneWest Bank FSB is the holder of the promissory note as of the date it was signed.

☐ Admit ☐ Deny

2.3.4.A RCW 62A.3-302(d)(2) states to be considered a holder/holder in due course the party:

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in RCW 62A.3-306, and (vi) without notice that any party has a defense or claim in recoupment described in RCW 62A.3-305(a).

2.3.4.B Defendant OneWest is ineligible to be considered the holder by definition of RCW 62A.3-302.

2.3.5 Does Defendant OneWest acknowledge the letter dated May 18, 2010 sent to the Plaintiff as having come from OneWest?

☐ Yes ☐ No

1 2.3.6 If YES does OneWest acknowledge that the aforementioned letter stated that Freddie
2 Mac is the investor on the loan in question?

3 _____ Yes _____ No

4 2.3.7 As OneWest's alleged role of servicer they know FreddieMac is not the current owner
5 of the promissory note in question.

6 _____ Admit _____ Deny

7 2.5 Defendant Northwest Trustee Services sent or caused to be sent a Notice of Trustee Sale to
8 Plaintiff on or about February 12, 2010.

9 _____ Admit _____ Deny

10 2.6 Paragraph 2.6 of the Initial Complaint and Defendant's Answer to Initial Complaint

11 2.6.1 Defendants acknowledge that Plaintiff sought a loan modification.

12 2.6.2 Plaintiff submitted a short sale offer to Defendant OneWest.

13 _____ Admit _____ Deny

14 2.6.3 Defendant OneWest did not respond to the short sale offer.

15 _____ Admit _____ Deny

16 2.6.4 No response requested. Plaintiff offered the short sale when contemplating relocating
17 out of the area.

18 2.7 Defendants denied the entirety of Paragraph 2.7 on the basis of not having enough information.

19 2.7.1 The abovementioned Appointment of Successor Trustee states that OneWest Bank
20 FSB is the owner of the promissory note.

21 _____ Admit _____ Deny

22 2.7.2 The letter (**Docket #1, Exhibit G**) from OneWest to Plaintiff on May 18, 2010 states
23 that Freddie Mac is the investor of the note.

24 _____ Admit _____ Deny

25 2.7.3 In the declaration of San Pedro **Docket #16**, San Pedro states that OneWest
26 services the loan for Freddie Mac

27 _____ Admit _____ Deny

1 2.7.4 In the declaration of San Pedro, San Pedro states that Freddie Mac is the investor
2 for the Promissory Note.

3 _____ Admit _____ Deny

4 2.7.5 The investor is the entity that purchased the loan from the original lender.

5 _____ Admit _____ Deny

6 2.7.6 It does not appear that Defendant OneWest sold the ownership of the Promissory
7 Note to Freddie Mac between January of 2010 and May of 2010.

8 _____ Admit _____ Deny

9 2.7.7 The Court agreed that it is unclear who the real party of interest is. **Docket #24**

10 2.7.8 It appears to Plaintiff that Defendant OneWest is ineligible to be the beneficiary if it
11 is not the owner/holder of the promissory note in question by definition below.

12 2.7.8.A 61.24.005(2) states, "'Beneficiary" means the holder of the instrument or
13 document evidencing the obligations secured by the deed of trust, excluding
14 persons holding the same as security for a different obligation."

15 2.7.8.B RCW 62A.3-302(b)(2) states in order to be the holder one would have to:

16 (2) **The holder took the instrument (i) for value, (ii) in good faith, (iii)**
17 without notice that the instrument is overdue or has been dishonored or
18 that there is an uncured default with respect to payment of another
19 instrument issued as part of the same series, (iv) without notice that the
20 instrument contains an unauthorized signature or has been altered, (v)
21 without notice of any claim to the instrument described in RCW 62A.3-
22 306, and (vi) without notice that any party has a defense or claim in
23 recoupment described in RCW 62A.3-305(a).

24 2.9 Section 2.9 in Complaint

25 2.9.1 Defendants did not address section 2.9 in their Answer to the Complaint. It
26 is uncertain whether this was out of carelessness in the preparation or simply a decision not to answer.

27 2.9.2 In order to prevent more of the same from the Defense, Plaintiff will break
28 down the basics of Section 2.9 in the Complaint.

1 2.9.3 Defendant OneWest, as the alleged servicer, would know if the loan has
2 been securitized into a mortgage backed security.

3 ____ Admit ____ Deny

4 2.9.4 Has the loan in question been placed into a mortgage backed security?

5 ____ Yes ____ No

6 2.9.5 A pool of mortgages is governed by a document called the Pooling and
7 Servicing Agreement.

8 2.9.6 Plaintiff sent a document referred to as a Qualified Written Request to
9 Defendants MERS, Northwest Trustee and OneWest.

10 ____ Admit ____ Deny

11
12 2.9.7 Defendant OneWest Bank sent a letter to Plaintiff dated May 18, 2010
13 declining to answer the request.

14 ____ Admit ____ Deny

15 **III. Plaintiff's Claims**

16 3.1 Claim of Violations of Deed of Trust Act RCW 61.24 *et seq.*

17 3.1.1 It appears to Plaintiff that Defendant OneWest cannot be a beneficiary due to the
18 lack of holder status as defined by RCW 62A.3-302. It seems OneWest does not own the promissory note,
19 nor has it become holder due to never taking the note for value as required to be considered a holder.

20 2) The holder took the instrument (i) for value, (ii) in good faith, (iii)
21 without notice that the instrument is overdue or has been dishonored or
22 that there is an uncured default with respect to payment of another
23 instrument issued as part of the same series, (iv) without notice that the
24 instrument contains an unauthorized signature or has been altered, (v)
25 without notice of any claim to the instrument described in RCW 62A.3-
26 306, and (vi) without notice that any party has a defense or claim in
27 recoupment described in RCW 62A.3-305(a).
28

3.1.2 It appears to Plaintiff that Defendant OneWest violated RCW 61.24.010(2) by appointing Defendant Northwest Trustee Successor Trustee without being the beneficiary/holder/owner of the promissory note as stipulated by 3.1.1.

(2) The trustee may resign at its own election or be replaced by the beneficiary. The trustee shall give prompt written notice of its resignation to the beneficiary. The resignation of the trustee shall become effective upon the recording of the notice of resignation in each county in which the deed of trust is recorded. If a trustee is not appointed in the deed of trust, or upon the resignation, incapacity, disability, absence, or death of the trustee, or the election of the beneficiary to replace the trustee, **the beneficiary shall appoint a trustee or a successor trustee. Only upon recording the appointment of a successor trustee in each county in which the deed of trust is recorded, the successor trustee shall be vested with all powers of an original trustee.**

3.1.3 It appears to Plaintiff that Defendant OneWest and Defendant Northwest Trustee Services violated RCW 61.24.010(2) by Defendant OneWest causing Northwest Trustee to begin duties of a Trustee without having a recorded Appointment of Successor Trustee, and Northwest Trustee violated by commencing duties of a Trustee without being appropriately appointed.

3.1.4 It appears to Plaintiff that Northwest Trustee Services has violated RCW 61.24.010(4). Defense stated that Northwest Trustee had a previous status in this matter with OneWest as an "agent" **Docket #19**, thereby working together in opposition to Plaintiff. Per actions stated in 3.1.3 Northwest Trustee would be aware it had not become Trustee as required. Further it is Plaintiff's opinion that working together with Defendant OneWest in a capacity other than Trustee prevents the trustee from being impartial and acting in equal good faith to all parties concerned. You cannot have equal treatment when two of the three parties are having a secret affair.

RCW 61.24.010(4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.

3.1.5 It appears to Plaintiff that Defendant Northwest Trustee was further in violation of 61.24.010(4) by failing to disclose its Affiliated Entity status as defined by RESPA with Routh, Crabtree and Olsen who was acting on behalf of Defendant OneWest as a debt collector.

3.1.6 Further it appears to Plaintiff that Defendant Northwest Trustee violated RCW 61.24.010(4) by conducting the business of a Trustee in preparing, serving, causing to be served and executing the Notice of Default in question before becoming the alleged Trustee on February 4th, 2010 (*Docket #18, Exhibit C*).

3.1.7 It appears to Plaintiff that Defendant OneWest is in violation of RCW 61.24.030 by claiming to be the beneficiary at the time the Notice of Default in question was executed on January 12, 2010 when it was not allegedly transferred beneficiary status until January 27, 2010.

3.1.7.A Did Routh Crabtree and Olsen or Northwest Trustee Services file for recording either the Assignment of Deed of Trust or Appointment of Successor Trustee on behalf of Defendant OneWest?

☐ Yes ☐ No

3.1.18 It appears to Plaintiff that Defendant Northwest Trustee is in violation of RCW 61.24.030(7)(a) as allowed by RCW 61.24.030(7)(b) by causing to be filed a Notice of Trustee Sale under the direction of Defendant OneWest without appropriately identifying OneWest as the owner and holder of the Note as defined by RCW 61.24.005 and RCW 62A.3-302. Defendants' council states that a pre-existing relationship between Northwest Trustee and OneWest existed in specific regards to the issue at hand before Northwest Trustee began duties as Trustee.

RCW 61.24.030(7)(a) and (b)

(a) That, for residential real property, before the notice of trustee's sale is recorded, transmitted, or served, the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust. A declaration by the beneficiary made under the penalty of perjury stating that the beneficiary is the actual holder of the promissory note or other obligation secured by the deed of trust shall be sufficient proof as required under this subsection.

(b) Unless the trustee has violated his or her duty under RCW
61.24.010(4), the trustee is entitled to rely on the beneficiary's
declaration as evidence of proof required under this subsection.

3.1.19 It appears to Plaintiff that Defendant OneWest was in violation of RCW
61.24.030(8)(c) by claiming to be in the declaration of the beneficiary the beneficiary on the date of January
12, 2010 notated on the Notice of Default when it was not.

3.1.20 It appears to Plaintiff that Defendant Northwest Trustee was in violation of RCW
61.24.030(8)(c) by executing the Notice of Default on January 12, 2010 as Trustee when it was not allegedly
assigned Successor Trustee status until January 27, 2010 and recorded on February 4, 2010 as required by
law.

3.1.21 It appears to Plaintiff that Defendant OneWest is in violation of RCW
61.24.030(8)(l) by failing to put on the Notice of Default the name and address of the owner of the
promissory note in question.

"In the event the property secured by the deed of trust is residential real
property, the name and address of the owner of any promissory notes
or other obligations secured by the deed of trust and the name, address,
and telephone number of a party acting as a servicer of the obligations
secured by the deed of trust."

3.1.22 It appears to Plaintiff that Defendant Northwest Trustee is in violation of RCW
61.24.030(8)(l) by failing to provide the name and address of the owner of the promissory note on the Notice
of Default.

3.1.23 It appears to Plaintiff that Defendant OneWest is in violation of RCW 61.24.031(2)
by claiming to be the beneficiary on the Declaration of Beneficiary that accompanied the Notice of Default
when it was not on January 12, 2010.

(2) A notice of default issued under RCW 61.24.030(8) must include a
declaration, as provided in subsection (9) of this section, from the
beneficiary or authorized agent that it has contacted the borrower as
provided in subsection (1)(b) of this section, it has tried with due

diligence to contact the borrower under subsection (5) of this section, or the borrower has surrendered the property to the trustee, beneficiary, or authorized agent. Unless the trustee has violated his or her duty under RCW 61.24.010(4), the trustee is entitled to rely on the declaration as evidence that the requirements of this section have been satisfied, and the trustee is not liable for the beneficiary's or its authorized agent's failure to comply with the requirements of this section.

3.1.24 It appears to Plaintiff that Defendant Northwest Trustee is in violation of RCW 61.24.031(2) by failing to verify Defendant OneWest as the beneficiary at the time the Notice of Default was executed. If Miss Buck is to be believed they already had a previously ongoing business relationship regarding the matter at hand prior to becoming the alleged successor trustee.

3.1.25 Plaintiff alleges that Defendant MERS illegally signed over rights to the promissory note which it has never owned or held in due course to Defendant OneWest Bank on the Assignment of Deed of Trust paragraph 2. "Together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrue under said Deed of Trust." Defendant MERS has repeatedly stated in court cases, interviews and on its own website that it has no financial interest in promissory notes and does not purchase or sell promissory notes.

3.2 Plaintiff's Claim of Slander of Title

3.2.1 Plaintiff James McDonald repeats and realleges each and every item and allegation above as if fully and completely set forth herein.

3.2.2 It appears Defendant Northwest Trustee slandered title by filing an unlawful Notice of Trustee Sale in public record, being unlawful to all of the violations in 3.1.

3.2.3 It appears Defendant OneWest caused Northwest Trustee to slander title by filing an unlawful Notice of Trustee Sale in public record, being unlawful to all of the violations in 3.1

3.3 Plaintiff's Claim of Wrongful/Unlawful Foreclosure

3.3.1 Plaintiff James McDonald repeats and realleges each and every item and allegation above as if fully and completely set forth herein.

1 3.3.2 It appears to Plaintiff that Defendants OneWest and Northwest Trustee are in
2 violation of RCW 19.86.020 by making false claims and utilizing deceptive business practices as laid out in
3 Section 3.1.

4 3.3.3 Plaintiff alleges Defendant OneWest initiated a non-judicial foreclosure pretending to
5 be the owner and holder of the Note when in fact they were not. Only the owner and holder of the Note can
6 initiate non-judicial foreclosures.

7 3.3.4 It appears to Plaintiff that Defendant Northwest Trustee participated in the initiation
8 of an unlawful non-judicial foreclosure due to the many violations noted above in section 3.1.

9 **3.4 Claim for Temporary Restraining Order and Permanent Injunction**

10 3.4.1 Plaintiff James McDonald repeats and realleges each and every item and allegation
11 above as if fully and completely set forth herein.

12 3.4.2 The Court has already upheld Claim #4 in the initial Complaint by granting a
13 Temporary Restraining Order and Preliminary Injunction (***Docket #24***). At the time of the writing of this
14 response Defendants have not appealed this decision. It appears to Plaintiff that Defendants are no longer
15 contesting this claim, even though the Answer to the Initial Complaint was filed after the Hearing for the
16 TRO.

17 **3.5 Claim for Lack of Standing**

18 3.5.1 Plaintiff James McDonald repeats and realleges each and every item and allegation
19 above as if fully and completely set forth herein.

20 3.5.2 It appears to Plaintiff that OneWest has no real interest in the real property that is
21 the subject of this lawsuit. Defendant OneWest has stated that they are NOT the owner of the Note ***Docket***
22 ***#16***.

23 3.5.3 Defendant OneWest claims to have servicing rights but has not provided the
24 Servicing Agreement to prove their claim. Even if they do, only the owner and holder as defined by
25 RCW 61.24.005 and RCW 62.3-302 can initiate a non-judicial foreclosure.

26 3.5.4 Defendant MERS does not have standing as a real party of interest as they claim no
27 ownership rights of the promissory note for the real property in question.
28

3.5.5 Defendant Northwest Trustee appears to have been inappropriately assigned as Successor Trustee by Defendant OneWest and therefore has no interest as a trustee.

IV. Defendants' Defenses

4.1 First Affirmative Defense – Failure to State a Cause of Action

4.1.1 Plaintiff believes that Defendants' defense for Failure to State a Cause of Action is frivolous. Plaintiff has stated multiple causes of action which has had preliminary hearings before the Court during the Motion for Temporary Restraining Order and Preliminary Injunction. The honorable Court noted in its ruling that the Plaintiff's case has merit which would be impossible if the Plaintiff hadn't stated a cause of action.

4.2 Defendants' Second Affirmative Defense – Failure to Mitigate Damages

4.2.1 Plaintiff strongly denies the Defendants' allegation that Plaintiff failed to attempt to mitigate damages. Plaintiff, in good faith, attempted several times to work with Defendants OneWest, MERS and Northwest Trustee through loan modification, short sale offer and administrative fact finding through a Qualified Written Request and Debt Validation Demand. Every attempt that Plaintiff has made was either denied, ignored or refused as shown in Defendants own testimony, answer to initial complaint and Defendant OneWest's letter to Plaintiff dated May 18, 2010.

4.2.2 If anything, the Failure to Mitigate Damages rests with the Defendants for refusing to work in good faith with the Plaintiff to provide the information the Plaintiff requested even up to who the actual and current owner of the Promissory Note is so Plaintiff could contact them directly.

4.3 Defendants' Third Affirmative Defense – Equitable Defense, Laches

4.3.1 The Doctrine of Laches does not apply to this case.

4.3.1 Prior to any late payments, Plaintiff attempted to receive assistance from Indymac Mortgage Services and was told they were unable to assist.

4.3.2 Plaintiff began taking administrative actions upon becoming aware of the issues and legal problems at hand quickly. Plaintiff in good faith attempted to work with Defendant OneWest to achieve a fair result. When Defendant OneWest repeatedly refused, Plaintiff began studying, researching and preparing for the current case.

4.3.3 At no time did Plaintiff act in a negligent manner to his rights which would be the basis of a Doctrine of Laches defense.

4.3.4 Further, Plaintiff believes Defendants' claim of unclean hands is unfounded. Plaintiff has repeatedly stated he is willing to work out a solution that is reasonable. It appears to Plaintiff that Defendants would prefer to be unjustly enriched.

4.4 Defendants' Fourth Affirmative Defense – Defendants Acted in Good Faith

4.4.1 Plaintiff is again surprised by Defendants claim that they acted in good faith. Plaintiff believes there are at least 25 infractions of RCW 61.24 alone which include misrepresentations of party, breach of rights and making false statements in publicly recorded documents. Further, in Plaintiff's opinion, Defendants have further not acted in Good Faith by refusing to reveal the true owner of the Promissory Note both in administrative attempts by Plaintiff and as RULED BY LAW on the Notice of Default.

4.5 DEFENDANTS' FIFTH AFFIRMATIVE DEFENSE – Plaintiff Not Entitled to Relief

4.5.1 Plaintiff disagrees strongly with this defense as RCW 61.24 and RCW 19.86 indicates Plaintiff IS entitled to relief. Further the Court has agreed that Plaintiff is entitled to relief, so far in part, by granting relief with a Temporary Restraining Order and Preliminary Injunction which was granted before this Answer was submitted!

4.6 SIXTH AFFIRMATIVE DEFENSE – PLAINTIFF'S OWN NEGLIGENCE

4.6.1 Plaintiff denies the Defendants' allegations that Plaintiff was negligent. In Plaintiff's opinion he has already shown multiple attempts at a positive solution before turning to the Court for relief from an unlawful foreclosure.

4.7 TENTH AFFIRMATIVE DEFENSE – SUFFERED NO DAMAGES

4.7.1 Plaintiff denies the Defendants' allegations that Plaintiff suffered no damages. Plaintiff's civil, legal and contractual rights have been violated in addition to severe interruption of Plaintiff's way of life.

4.8 ELEVENTH AFFIRMATIVE DEFENSE – WAIVER

4.8.1 Plaintiff strongly denies the Defendants defense on the doctrine of waiver.

4.8.2 The Doctrine of Waiver is only applicable if the Plaintiff has failed to restrain or attempt to restrain the action of the Defendant(s). As the Defense is very well aware Plaintiff moved

1 for and received a Temporary Restraining Order and Preliminary Injunction against the Defendants.
2 It appears to Plaintiff that this is a frivolous defense.

3 4.8.3 Further, RCW 61.24.127 states that even if no restraint is attempted that the lack of
4 constraint does not constitute waiver.

5 **4.9 TWELFTH AFFIRMATIVE DEFENSE – NO COST OR ATTORNEY FEES**

6 4.9.1 Plaintiff denies the Defendants allegation Plaintiff is not eligible to receive costs and
7 attorney fees.

8 4.9.2 Defense is incorrect in claiming that Plaintiff "has not alleged any statute or contract
9 which entitles Plaintiff to attorney's fees in the Complaint." Page 24, Line 20 of the Initial Complaint states
10 that Plaintiff is entitled to costs and fees under RCW 19.86 which allows for both treble damages and
11 attorneys fees due to deceptive and unfair business practices. Once again this entire Answer appears to be
12 more of a template answer in hopes the Plaintiff as pro se will screw up than any serious attempt at a
13 defense.

14 **4.10 THIRTEENTH AFFIRMATIVE DEFENSE – FRIVOLOUS ACTION**

15 4.10.1 Plaintiff emphatically denies the Defendants' allegation that this is a frivolous
16 action.

17 4.10.2 This defense in and of itself is frivolous as the Honorable Court has already stated
18 that the lawsuit in question has merits. Defense's attempt to call this a frivolous action AFTER the ruling on
19 the Temporary Restraining Order and Preliminary Injunction is nothing short of an insult to the Court in the
20 Plaintiff's opinion.

21 **4.10 PLAINTIFF MOVES THE COURT FOR SANCTIONS**

22 4.10.1 It appears to Plaintiff that Defendants and their council are attempting to take
23 advantage of the fact that Plaintiff is Pro Se and his lack of experience in litigation by attempting unusable
24 defenses that any experienced attorney would rip apart quickly and efficiently. Defendants have used
25 frivolous and unsubstantiated defenses including insulting the Courts decision that the case has merits and
26 is therefore not frivolous. Further this seemingly Answer does nothing to forward the motion of this case and
27 therefore only causes unnecessary delay of the process and harasses the Plaintiff. Therefore under FCRP
28

11 Plaintiff moves this Honorable Court to order sanctions of \$2,500 each against Defendants MERS, Northwest Trustee Services and OneWest Bank FSB and additional sanction of \$5,000 against Defense Council Heidi Buck and Routh Crabtree Olsen or any amount the Court deems worthy.

V. Reservation

5.1 Plaintiff hereby reserves the right to amend this Response to the Answer of the Initial Complaint as well as the Complaint itself by way of adding additional causes of action, amendments to current causes of action and additional evidence to support Plaintiff's allegations.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for judgment as follows:

1. That Defendants MERS, Northwest Trustee Services and OneWest Bank be sanctioned \$2,500 each.
2. That Defense Counsel Heidi Buck be sanctioned \$5,000.
3. That the Court grant the Plaintiff Declaratory Judgment by ordering the Defendants to produce the following documents (Plaintiff will also submit a separate Motion for Declaratory Judgment to follow this Answer to the Initial Complaint to comply with procedure):

A. Loan Purchase Agreement(s)

A.1 Provide the original purchase agreement between Indymac and the initial purchaser of the promissory note, whomever that may be, and any subsequent purchase agreement whether to Freddie Mac or any unknown party.

A.2 Relevance: This goes to prove who is actually the Holder/Owner/Beneficiary and which, if any, of the defendants are a real party of interest with the proper authority to collect Plaintiffs payments, who they are going to, and who has the authority to initiate non-judicial foreclosure proceedings.

A.3 To be provided by Defendant OneWest and Defendant MERS

B. All endorsements and conveyances of the original note

B.1 Properly executed with transfers made to the proper entities in proper sequence, so as to show a complete chain of title to the note from the original lender to the holder of the note.

B.2 Relevance: This goes to prove who is actually the owner and holder of the note and to ensure all federal and state laws as well as accounting procedures have been followed.

B.3 To be provided by Defendant OneWest and Defendant MERS

C. Servicing Agreement(s)

C.1 Any and all servicing agreements between Indymac and the purchasers of the promissory note and holders in due course of the promissory note as defined by RCW 62A.3-302.

1 C.2 Any and all servicing agreements between OneWest and the purchasers and holders
in due course of the promissory note as defined by RCW 62A.3-302.

2 C.3 Any agreement between Indymac Bank F.S.B. and OneWest Bank to obtain the
3 servicing rights of the specific Deed of Trust in question.

4 C.4 Relevance: This goes to show what, if any, rights OneWest has. It should be noted
OneWest has repeatedly stated that they have a servicing agreement with Freddie Mac to perform the
5 actions they have but they have not willingly brought this document before the Court to prove their claim.

6 C.5 To be provided by Defendant OneWest.

7 **D. Insurance Policies or Over-collateralization procedures**

8 D.1 Insurance policy purchased by Indymac on the individual promissory note.

9 D.2 Insurance policy or policies purchased by Indymac or any other party on the "pool" of
loans sold jointly to any investor.

10 D.3 Relevance: This goes to determine what the actual balance of the loan secured by the
Deed of Trust is should there have been any payouts of insurance claims.

11 D.4 To be provided by Defendant OneWest and Defendant MERS.

12 **E. MERS MIN Summary**

13 E.1 The MIN Summary is a list of all activities regarding the loan in question including all
purchases of the note, conveyances, recordings, sales and other data. This is the service MERS purports
14 to give to their clients. However this in and of itself does not fully complete the picture as some activities
15 may have been deleted or failed to be recorded as MERS allows individuals outside of their company to
enter the data. It will still provide a very valuable piece to the puzzle over who actually has standing.

16 E.2 To be provided by Defendant MERS

17
18 **F. MERS Membership Agreement**

19 F.1 Agreement between MERS and Indymac detailing their rights as a nominal beneficiary
on the Deed of Trust in question.

20 F.2 MERS Membership agreement for each defendant along with any amendments and a
21 listed of authorized signers. For each Defendant.

22 F.3 Relevance: Goes to showing if MERS did in fact have the rights as a nominal
23 beneficiary to appoint a new beneficiary without authorization from the owner and holder of the note.

24 F.4 MERS Membership Agreement between MERS and all subsequent owners of the
promissory note in question to determine whether MERS could be allowed remain as beneficiary. In
25 Washington State the security instrument (deed of trust) follows the note so the beneficiary status should
26 have been transferred to whomever purchased the loan from Indymac unless they had an agreement with
27 MERS.

28 F.5 To be provided by Defendant MERS.

G. Authorized Signatory Agreements

1 G.1 Signed agreement between MERS and OneWest Employee Brian Burnett giving him
2 the title of Assistance Vice President of MERS and detailing his rights and responsibilities to act on their
3 behalf.

4 G.2 Relevance: There is a significant question regarding whether or not Brian Burnett was
5 authorized to appoint OneWest as the beneficiary of the Deed of Trust and this will answer it.

6 G.3 To be provided by Defendant MERS.

7 **H. Accounting Records for Note**

8 H.1 All accounting records including general ledgers and account statements showing
9 payments disbursed to the owner, holder and beneficiary of the note from the conception of the agreement
10 through present.

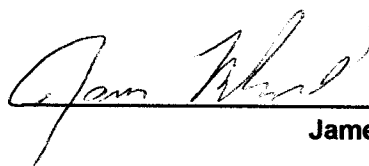
11 H.2 To be provided by Defendant OneWest as alleged servicer.

12 G. Agreement between OneWest and Northwest Trustee for Northwest Trustee to act as
13 OneWest's "agent" prior to becoming the trustee as occurred by Miss Buck's testimony in the TRO Hearing.

14 G.1 Relevance: Goes to show authority to assist with preparation of Notice of Default
15 before they were identified as the trustee per RCW 61.24.

16 G.2 To be provided by Defendant Northwest Trustee Services.

- 17 4. That the Court rule the Notice of Default in question to be invalid
- 18 5. That the Court rule the Appointment of Successor Trustee in question to be invalid
- 19 6. That the Court rule the original Notice of Trustee Sale and all additional Notices of Trustee Sale to
- 20 be invalid and removed from King County Public Records
- 21
- 22
- 23
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- 27
- 28



James McDonald
Pro Se

1 JAMES MCDONALD
2 14840 119th PL NE
3 Kirkland, WA 98034
4 Phone (425) 210-0614
5 In Pro Per

6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

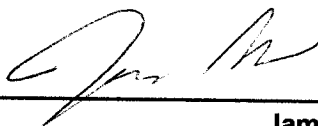
9 In Re:) NO.: C10-1952RSL
10)
11 JAMES MCDONALD)
12 Plaintiff)
13 v) Declaration of Service
14 ONEWEST BANK, FSB, *et al.*,)
15 Defendants.)
16 -----)

17 CERTIFICATE OF Service

18 I hereby certify under penalty of perjury of the laws of the State of Washington that I
19 electronically sent a true and correct copy of the Response of Defendants Answer to the Initial
20 Complaint, by James McDonald, on the 11 day of February, 2011 to the parties listed below.

21 DATED this 11 day of February, 2011.

22 By: _____



23 James McDonald
24 Pro Se

25 Routh Crabtree Olsen, P.S.
26 13555 SE 36th St, Suite 300
27 Bellevue, WA 98006

28 Certificate of Service

-1-

James McDonald

14840 119th PL NE, Kirkland, WA 98034

Phone: (425) 210-0614

1 JAMES MCDONALD
2 14840 119th PL NE
3 Kirkland, WA 98034
4 Phone (425) 210-0614
5 In Pro Per

6 UNITED STATES DISTRICT COURT
7 FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

8 In Re:

NO.: C10-1952RSL

9 JAMES MCDONALD

10 Plaintiff

v

11 ONEWEST BANK, FSB, *et al.*,
12 Defendants.

PROPOSED
ORDER GRANTING Sanctions

13
14 This matter came before the Court upon James McDonald's (PLAINTIFF)'s motions listed
15 under the Plaintiff's Prayer for Relief within Plaintiff's Response to the Defendants Answer to Initial
16 Complaint. The Court considered the motion and any opposition thereto and the matters on record.
17 It appears for the reasons stated in the motion that the removal of the opposing counsel should
18 occur.

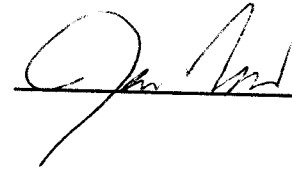
19 IT IS THEREFORE ORDERED

- 20 1. That Defendants MERS, Northwest Trustee Services and OneWest Bank be sanctioned \$2,500
21 each to be paid to the Plaintiff.
22 2. That Defense Counsel Heidi Buck be sanctioned \$5,000 to be paid to the Plaintiff.

23
24
25
26 Dated this ____ day of _____, 20__

27 _____
28 Robert S. Lasnik, United States District Judge

Presented by:


James McDonald
Pro Se